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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-313

WILLIAM F. BUCKLEY, JR., NATIONAL REVIEW and M. STANTON EVANS, *Petitioners,*

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, *Respondent.*

No. 74-314

FULTON LEWIS, III, *Petitioner,*

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, *Respondent.*

BRIEF IN OPPOSITION FOR RESPONDENT

In the pending petitions three nationally known commentators attack the proviso to Section 8(a)(3) of the National Labor Relations Act which permits union-employer agreements requiring each employee to become a "member" of the union to the extent of paying periodic dues and initiation fees. That

financial support requirement permitted by the federal law is upheld below by three federal appeals judges in *Buckley,* and by all seven judges of the New York Court of Appeals in *Lewis.* Moreover, all ten judges in the two lower courts have correctly ruled that petitioners' subsidiary claim—that "misrepresentation" and "coercion" induced them to go beyond support to join and remain regular AFTRA members—presents only a Labor Board-preempted claim of NLRA violation.[1] We demonstrate herein that no new or substantial question is presented by these rulings below, but first pause to state the context of the controversy.

COUNTERSTATEMENT

Petitioners present several subsidiary grievances and challenges to the federal statute which may obscure the central thrust of their attack. For instance, petitioners object that when first employed by the media they were induced by misrepresentations to become regular AFTRA members rather than mere dues payers; but they have never sought to resign from the Union. Similarly, petitioners assert that because of their Union membership, in a possible future AFTRA strike they may fear to express on the air their personal strike opposition; but again they have not sought to avoid such a possible constraint by resigning their membership. Indeed petitioners have never even filed

[1] The only plea by petitioners which won any support below, from two dissenting New York judges, is that their First Amendment rights are violated because the federal labor law compels them to go beyond mere dues payments by becoming and remaining regular union members. As we emphasize hereafter, that reflects a complete misconception of the federal statute, contrary to its definitive construction by this Court as permitting no greater compulsion on Mr. Buckley and his fellow petitioners than the payment of pro-rata dues to their bargaining representative.

unfair labor practice charges against AFTRA. But beyond these secondary grievances there lies petitioners' more fundamental objection: as stated in the first of their "questions presented" (see *Buckley* Pet. p. 2), petitioners *"challenge their liability to pay dues because the union has not functioned as their 'exclusive representatives' as provided by § 9(a) and has conferred upon them minimal, if any, benefit."*

That contention caps petitioners' repeated refrain in these suits that they have negotiated higher than usual individual wage scales with their employers, as permitted to commentators by the Union contract, and "did not seek, and do not desire, to be represented by the union" (*Buckley* Pet. 12b). They assert that they should have to give no financial support at all to the Union, simply shrugging aside AFTRA's functions in maintaining the bargaining organization, providing grievance-arbitration representation, and achieving collective agreements. Those agreements stipulate rights which the employers cannot diminish or omit in individual contracts, and thus provide the foundation on which individual commentators may sometimes build additional benefits. The AFTRA collective bargaining agreements guarantee that producers will *"make no contract with any performer at terms less favorable"* than those collectively bargained (*Buckley* J. A. 313a). Among other provisions, the agreements give assurance against free replays and foreign uses (*id.* at 297a), establish access to arbitration (*id.* at 317a), and define safeguards with respect to pay television (*id.* at 316a). These are among benefits which even such potent bargainers as Mr. Buckley would not have been able to obtain on their own, and owe to bargaining by the Union even though they have subsequently suc-

ceeded in using the guarantee of "no contract . . . at terms less favorable" to get equivalent clauses in their individual contracts.

Petitioners' ultimate objection to dues payment because they "do not desire to be represented by the union" thus attacks the core of NLRA's collective bargaining principle. That attack was put to rest more than thirty years ago in such landmark decisions as *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, and *J. I. Case* v. *Labor Board*, 321 U.S. 332. To the claim that "an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group", this Court answered in *J. I. Case* that it could not "except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones . . ." (321 U.S. at 338, 339). Of course, it is hardly surprising that it is these petitioners who resurrect the attack on the principle of collective bargaining and the compulsory dues support based thereon; after all, the anti-union creed which petitioners publicly espouse in their broadcasts is one which continues to resist the Wagner Act's central premise. Moreover, it is money donated through "Right to Work" organizations by employers who share that creed which is financing these petitioners' suits.[2]

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[2] In a pending federal case it has been conceded by the chief officer of the National Right to Work Committee that the organization is at least 84% employer-financed (see deposition of Reed Larson, p. 316, and response #7(e) to plaintiffs' third interrogatories in *International Union* v. *National Right to Work*, Civ. A. 839-73, U.S. District Court for the District of Columbia). In 1966 Buckley assigned his AFTRA insurance benefits to the Committee (*Buckley* J. A. 521a) and beginning in 1967 he repeatedly asked that organization to finance his proposed suit against AFTRA; ultimately such financing was undertaken to the extent

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In assessing petitioners' attack on their dues payment obligation and its underlying premise of shared responsibility for the costs of collective bargaining, it is noteworthy that in the years since this Court upheld the Wagner Act's "closed shop," federal union security law has moved far toward meeting interests of employee abstention from unionism. In a succession of Congressional amendments and clarifying rulings by this Court, the closed shop has been replaced by rules which balance fair union demands for sharing of costs by all those represented with the individual employee's option of abstention and dissent. These include (1) replacement of the "closed shop" by the "union shop" permitting no greater employment compulsion on workers than their payment of financial support to the bargaining representative; (2) the limitation of such required support by exclusion of union political-ideological expenditures unrelated to collective bargaining; and (3) recognition of Labor Board authority to prevent union interference with an employee's option to resign his union membership:

(i) In 1947 Congress abolished the "closed shop", by adopting the proviso to § 8(a)(3) which places strict limits on union security requirements. The balance struck permits an agreement with the union "to require as a condition of employment membership therein on or after the thirtieth day following the

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of the total costs of plaintiffs' attorney's fees in the *Buckley* and *Lewis* litigations, in an amount which now exceeds $100,000. (See deposition of Reed Larson, pp. 805-811, in Civ. A. 839-73, D.C. D.C.). The financial support is being furnished by the "National Right to Work Legal Defense and Education Foundation," created by the National Right to Work Committee in 1969 as its tax-exempt arm to finance anti-union suits throughout the nation.

beginning of such employment . . ." The section's second proviso further specifically stipulates that an employer may not impose sanctions for nonmembership in a labor organization whenever membership has been denied "*for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required . . .*" It was confirmed by this Court soon after this modification of NLRA that employment sanctions may be imposed only with respect to the failure to meet financial obligations. "Congress recognized the validity of unions' concern about 'free riders' . . . and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason." *Radio Officers* v. *Labor Board,* 347 U.S. 17, 41.

As a corollary of that ruling, and based on the express language of the second proviso to § 8(a)(3), it was also soon established that thereunder the union and the company may agree to enforce by employment sanctions only the employee's financial support, not membership as such. *Labor Board* v. *General Motors,* 373 U.S. 734, 742; see also *Labor Board* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 184, n. 37, and *Scofield* v. *Labor Board,* 394 U.S. 423, 428. As this Court held in *General Motors* (pp. 742-743), in § 8(a)(3) " 'Membership' as a condition of employment is whittled down to its financial core," so that "if an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees . . . the condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member."

(ii) Not only has this Court made clear that compulsory union membership under federal labor law has been "whittled down to its financial core", but to assure conformity with the First Amendment it has also reduced that financial core by excluding political-ideological expenditures unrelated to collective bargaining. In *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, this Court postponed resolution of a First Amendment challenge to union use of compulsory dues for politics, for the moment affirming only that compulsory financial support by all who are represented in collective bargaining under the Railway Labor Act is permissible. As the opinion stated it (at p. 238): "We . . . hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." This Court thus made the collective bargaining principle of the statute the predicate for upholding the statute's provision allowing compulsory financial support "by all who receive the benefits" of union representation.

Machinists v. *Street*, 367 U.S. 740, further confirmed the underlying principle. It declined to approve compulsory financial support by employees to the union's expenditures in the area of politics—an area wherein the union is *not* the statutory representative of the worker and each employee maintains his individual options of support or abstention. There (at pp. 768-769) this Court reconciled the union shop clause of the Railway Labor Act with the First Amendment by construing it so as to "deny the unions, over an employee's objection, the power to use his exacted funds to

support political causes which he opposes." On the other hand, the Court emphasized (p. 771) that "the union-shop agreement itself is not unlawful," and found (p. 772) that the lower court's injunctive interference with union dues collection from all employees "defeats the congressional plan to have all employees benefited share costs 'in the realm of collective bargaining.'" In sum, federal labor law now permits no greater "union security" compulsion on employees than their payment of financial support to their collective bargaining representative for costs not including political-ideological expenditures unrelated to collective bargaining functions.[3]

(iii) Finally, this Court has also ruled that the Labor Board has authority to protect a member's option to resign against all forms of union coercion or restraint. In *Labor Board* v. *Granite State Joint Board*, 409 U.S. 213, 216, the Board was found empowered to protect an employee against union interference with the recognized "right of the individual to join or to resign from associations." In that respect the opinion below by the Second Circuit notes (*Buckley* Pet. 15b) that AFTRA "acknowledges that Buckley

[3] This Court's suggestion in *Railway Clerks* v. *Allen*, 373 U.S. 113, that unions create internal machinery by which dissenters can be provided dues rebates for union political expenditures has been adopted by three major national unions. The United Auto Workers adopted such a Constitutional procedure at their 1968 national convention. Similar action was undertaken on June 13, 1974 by the national convention of the American Federation of State, County and Municipal Employees. Recently the International Association of Machinists and Aerospace Workers did likewise. There is no reason to suppose that other unions will not follow suit if demands are voiced by dissenters for rebates of political expenditures. AFTRA, however, is a union which does not engage in political expenditures activities.

and Evans can avoid any other sanctions which the union might seek to impose on them by resigning from 'full-fledged membership while continuing to pay dues.'" Under this Court's rulings the Labor Board is available to afford petitioners redress should the Union dishonor its recognition that petitioners can resign and confine their obligations to the dues payments which constitute the outer limit of compulsory unionism under federal law.[4]

This Court's salient constructions of federal union security have struck a fair and workable balance between the need for sharing the costs of collective representation and the individual employee's option of

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[4] In the District Court the Union expressly recognized that "an employee cannot be compelled to become a member of the union, to obey any union regulations or to be subject to any union disciplinary proceedings." It did so in the affidavit of the National Executive Secretary of AFTRA (*Buckley* J. A. 224a) stating as follows:

> "AFTRA has not sought or threatened to impose any limitations on [plaintiffs] freedom to say or write anything which they wish. The National Labor Relations Act bars the union from imposing any such limitation and there is available a specific and effective legal remedy before the National Labor Relations Board if any effort by the union to impose such should be attempted. Under Sections 8(a)(3) and 8(b)(2) of the Act and the decisions of NLRB and the courts in interpreting, applying and enforcing those provisions, an employee cannot be compelled to become a member of the union, to obey any union regulations or to be subject to any union disciplinary proceedings. The most that can be required of an employee under a union security provision agreed to by the employer is that the employee tender to the union an amount of money equal to regular dues and initiation fees."

The letter of May 1974 sent to Mr. Rusher of National Review, relied upon by petitioners (*Buckley* Pet. 13-14), nowhere negates their right to resign and confine themselves to dues payments and in any event came not from AFTRA but from an NBC executive.

abstention from unionism. Existing federal labor law represents a felicitous accommodation between the civil liberties of the individual worker and the collective needs of the labor organization. Even in the earlier era of the closed shop petitioners could not have prevailed in challenging their dues obligation and the collective bargaining system upon which it rests. But surely their attack is even less cogent at a time when compulsory unionism has been "whittled down to its financial core" and that core has itself been confined by exclusion of political-ideological costs unrelated to collective bargaining functions. Under these circumstances the courts below recognized that petitioners' financial support obligation rests on a firm footing in the necessities of collective bargaining. We proceed to demonstrate that their rulings present no substantial question for this Court's resolution.

REASONS FOR DENYING THE WRITS

1. No Substantial Question Is Presented by the Lower Courts' Conclusion that § 8(a)(3) of the National Labor Relations Act Is Consistent with the First Amendment in Permitting Compulsory Union Membership to the Extent of Pro-Rata Financial Support by Each Employee

In the first of their "questions presented" petitioners claim that their First Amendment rights are violated by "the authority of § 8(a)(3) of the National Labor Relations Act to compel the payment of dues by commentators on public affairs . . ." We submit, however, that the rulings by the Second Circuit and the Court of Appeals of New York that compulsory dues payment does not violate petitioner's First Amendment rights are eminently correct and present no new or substantial question for this Court's resolution.

Thus, it is the Second Circuit's cogent conclusion (*Buckley* Pet. 7b) that the dues payment requirement "does not abridge appellees' first amendment right of free speech," because, in permitting compulsory dues from all who are represented by the union, § 8(a)(3) serves a "substantial public interest" in preventing the "flagrant inequity" of free riders (*id.* 12b). That court also rejects (*id.* 12b-13b) petitioners' contention "that they did not seek, and do not desire, to be represented by the union and . . . have not derived any substantial benefits from the union's representation," finding no ground for "disinguishing between the degrees of benefit one enjoys as a result of a union's bargaining efforts on his behalf."[5] To like effect is the ruling below by the Court of Appeals of New York, which holds (*Lewis* Pet. 3A-4A) that the federal statute does not violate First Amendment rights in "requiring plaintiff to pay AFTRA dues." The Court relies for that conclusion on the *Street* holding that consistent with the Federal Constitution the RLA permits a contract under which "each employee must bear a fair share of the financial burden of union representation" (*id.* at 8A).

These rulings are correct applications of the principles announced by this Court as early as *Jones*

[5] The Second Circuit's ruling in that respect is fully confirmed by this Court's emphasis in *Maryland* v. *Wirtz*, 392 U.S. 183, 192-193, that Congress having the power to declare "that an entire class of activities affects commerce," the only question for the courts is whether the class as a whole is within the Congressional province. For "the contention that in Commerce Clause case. the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." In any event, it is manifest (see *supra* p. 3) that petitioners have indeed obtained substantial benefits from the collective agreements bargained by AFTRA.

& Laughlin and *J. I. Case,* and as recently as *Hanson* and *Street.* In rejecting petitioners' claim (see *Buckley* Pet. 12b) that "they did not seek, and do not desire, to be represented by the union," the courts below apply this Court's seminal rulings upholding the constitutionality of the Wagner Act and its collective bargaining system.[6]

Nor do petitioners gain any strength from their claim that although compulsory dues might properly be required in other industries, nevertheless the First Amendment immunizes them from such a requirement because petitioners are employed in the media as commentators. As Mr. Justice Powell has recently reminded, in First Amendment cases "it is important to identify with some care the nature of the alleged abridgement." *Pittsburgh Press Co.* v. *Human Relations Com'n.,* 413 U.S. 376, 382. Unlike *Pittsburgh Press,* here we are not even concerned with a statute that imposes any special duties on the press or in any way regulates its content; we have only the application of the collective bargaining system and its

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[6] The opinion by the two dissenting judges of the New York Court of Appeals finds a Constitutional infirmity because they believe that more than mere dues payment can be required under § 8(a)(3). They construe *General Motors* as a ruling that not mere dues payments but actual union membership can be compelled, so that in fact "the labor organization and not the employee has the 'option of membership'" (Lewis Pet. 14A). On that basis they find (*id.* 16A) that the First Amendment is violated because under the union shop agreement an employee of the media "is required to be a member of AFTRA, and, as such, is subject to all of the disciplinary sanctions to which members may be subjected." But the First Amendment issue which the dissenting judges perceive simply does not arise, for their construction of § 8(a)(3) is patently in conflict with this Court's repeated rulings confining its permissible scope to the financial realm. See *Radio Officers, General Motors, Allis-Chalmers, Scofield, Hanson, supra.*

dues payment obligation to employees of the media just as in every other industry. Petitioners' claim of special exemption was thus long ago answered in *Associated Press* v. *Labor Board*, 301 U.S. 103, 132-133. There John W. Davis argued that application of the National Labor Relations Act to newspapers violates the First Amendment because newspapers have an unconditional right to hire and fire whom they please. This Court answered (at 132) that "the publisher of a newspaper has no special immunity from the application of general laws." The Court's upholding of the applicability of the NLRA has since been echoed in countless rulings applying other regulatory schemes to the media. See citations in *Pittsburgh Press, supra,* at 382-383. Like decisions to tax the media or to regulate their business aspects, application of the NLRA collective bargaining scheme and the dues support requirement flowing from that scheme does not in any way "disable the press by undermining its institutional viability" *(Pittsburgh Press, supra,* at 382). In sum, petitioners' First Amendment attack on the NLRA's union shop provision presents nothing new and raises no substantial question for this Court.[7]

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[7] While never really clarifying how the First Amendment is infringed, petitioners did indicate below that it is their full membership in the Union—which, however, they have never sought to resign—that may create First Amendment conflict. As Mr. Buckley stated it: "My interpretation of the [Union] constitution is that I am not allowed to say certain things that I would be disposed to say because it might prejudice the welfare of the union," and "the union exercises over me certain disciplinary powers which could result in fining me or taking me off the air if I acted in such a way as to prejudice that union" (*Buckley* J. A. 273a). Such fears are quite unfounded. As stated by AFTRA's National Executive Secretary in his affidavit supporting summary judgment, Buckley can limit his union obligation simply to the payment of

2. No Substantial Question is Presented by the Lower Courts' Conclusion that Any Coercion on Petitioners to Become or Remain Regular Union Members Rather Than Mere Dues-Payers is Exclusively Redressable by the Labor Board as a Violation of the National Labor Relations Act

In their second question presented petitioners challenge the conclusion of the courts below that the National Labor Relations Board has exclusive jurisdiction over their subsidiary claim—the claim that "misrepresentation" and "coercion" induced them to become and to remain regular members of AFTRA subject to its rules and discipline. The courts below find that this allegation presents only a possible NLRA violation which is committed to the exclusive jurisdiction of the Labor Board. Applying the *Garmon* rule, the Second Circuit's opinion *(Buckley* Pet. 13b-17b) holds it the function of the Labor Board rather than the courts to redress any coercion or misrepresentation inducing petitioners to become or remain regular AFTRA members. The concurring opinion by Judge Friendly similarly concludes *(id.* 18b) that "to the extent that the appellees contend that the union would be committing an unfair labor practice by imposing fines or otherwise disciplining them, I agree that their claim is preempted." So too, as concerns petitioner Lewis the Court of Appeals of New York concludes

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union dues (*Buckley* J. A. 224a); moreover, he pointed out (*id.* at 225a) that:

> "The Supreme Court's position, with which AFTRA is in full accord, remains that unions should not be allowed to discipline members for exercise of their First Amendment rights. If at any time AFTRA should attempt or threaten in any way to discipline the plaintiffs for anything which they might say or print or if AFTRA should try to cause any broadcasting station or publication to refuse to employ them for any ideas which they may express, the courts of the United States will preserve and protect their free speech rights."

(*Lewis* Pet. 11A) that "If and when he lawfully severs his ties, he will be free of AFTRA's control. Jurisdiction to determine an unfair labor practice, if plaintiff believes that is what is involved here, lies with the NLRB and not with this Court."

These preemption rulings by the courts below are correct applications of this Court's decisions. The substance of petitioners' coercion claim is that they have wrongfully been induced to become or to remain members of AFTRA and fear its retaliation if they seek to resign and defy any strike which the Union may call. Under *Garmon* and *Lockridge* such a claim is neither more nor less than a preempted assertion of an NLRA violation. Employment sanctions to force union membership, strike support, or strike assistance, violate the statute. *Union Starch & Refining Co.* v. *NLRB,* 186 F.2d 1008, cert. denied 342 U.S. 815; *NLRB* v. *Bell Aircraft Corp.,* 206 F.2d 235 (C.A. 2, 1953); *NLRB* v. *Eclipse Lumber Co.,* 199 F.2d 684 (C.A. 9, 1952). Moreover, in *Labor Board* v. *Granite State Joint Board,* 409 U.S. 213, this Court upheld the Labor Board's jurisdiction to protect an employee's right "to join or resign from associations" against any form of union interference or coercion. Before petitioners resign from AFTRA their fears are quite conjectural. And should they resign and then experience any Union retaliation, the Labor Board would have full authority to afford them the statute's protection.

Thus, no more than their attack on the requirement that they share the costs of collective bargaining is there any new or substantial question presented by petitioners' attack on the lower courts' conclusion that

their coerced membership claim is committed to the exclusive jurisdiction of the Labor Board.[8]

CONCLUSION

For the foregoing reasons it is submitted that the petitions should be denied.

Respectfully submitted,

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[8] By an additional question presented petitioners assert (see *Buckley* Pet., 2, 17) that the FCC "fairness doctrine" gives the media "unrestricted discretion in the employment of commentators," thus barring the discharge of a commentator for nonpayment of his union dues. This strained suggestion is repelled by the nub of this Court's stricture in *Columbia Broadcasting System* that "no private individual or group has a right to command the use of broadcast facilities" (412 U.S. 94, 113). In any event, even if petitioners had a colorable claim that the fairness doctrine may be violated by their discharge for refusal to pay dues, primary jurisdiction over that claim would be vested in the Federal Communications Commission.